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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. [redacted]30

JAMES C. DAVIS, Agent Appointed by the President under the Reconstruction Acts of 1920, Complainant,

vs.

J. M. CURRIE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF RESPONDENT.

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## TABLE OF CONTENTS.


| | Page |
|---|---|
| Preliminary statement | 1 |
| Statement of fact | 2 |
| Statement of issues | 3 |
| Points and authorities | 4 |
| Argument | 6 |
| I. The judgment is for compensatory damages solely | 6 |
| 1. Concurrent findings of fact not disturbed | 6 |
| 2. This court will not consider whether verdict excessive | 7 |
| 3. No attempt to disguise nature and grounds of recovery | 8 |
| 4. Proper instructions were given to and followed by jury | 10 |
| II. Damages for humiliation, etc., are actual damages recoverable against the Government | 14 |
| 1. Compensatory damages are recoverable against Government | 14 |
| 2. Compensation for humiliation, etc., is a proper element of actual damages | 15 |
| III. Reply to petitioner's points | 18 |
| 1. Liability for willful conduct of agent | 18 |
| 2. Mathews v. Davis inapplicable | 20 |
| 3. Hines v. Gravins distinguished | 21 |
| 4. Davis v. Green distinguished | 23 |


### TABLE OF CASES CITED.


| | |
|---|---|
| Adams v. Ry. Co., 103 S. C., 327; 87 S. E., 1007 | 6, 15 |
| Calhoun v. Sou. Ry. Co., 115 S. C., 489; 106 S. E., 780 | 5, 9 |
| Cave v. Ry. Co., 94 S. C., 282; 77 S. E., 1017 | 5, 15 |
| Davis v. Green, 260 U. S., 349; 67 L. Ed., 299 | 23 |
| Director General v. Kastenbaum, 68 L. Ed., 84; Adv. Op., 1924, No. 3 | 6, 17 |
| Ginn v. Hines, 114 S. C., 236; 103 S. E., 548 | 5, 9 |
| Hines v. Gravins, 118 S. E., 114 | 21 |
| Jackson-Tweed Lbr. Co. v. Sou. Ry., 113 S. C., 236; 101 S. E., 924 | 5, 9 |

Page

Lake Shore R. Co. v. Prentice, 147 U. S., 101; 37 L. Ed., 97.... 6, 15
Lipman v. A. C. L. R. R., 108 S. C., 151; 93 S. E., 714..... 5, 15
Massey v. Hines, 117 S. C., 1; 108 S. E., 181..... 5, 9
Mathews v. Davis, 117 S. E., 642..... 20, 21
Missouri Pac. R. Co. v. Ault, 256 U. S., 554; 65 L. Ed., 1087. 4, 5, 9, 14
New Jersey, etc., Co. v. Brackett, 212 U. S., 637; 30 L. Ed., 1029 ..... 24
Scott v. Seymour, 105 S. C., 43..... 20
Seymour v. Director General, 290 Fed., 291..... 23
Smith v. Whitemire, 110 S. E., 80..... 20
Sou. Ry.-Carolina Division v. Bennett, 233 U. S., 80; 58 L. Ed., 860 ..... 4, 7
Tolbert v. Fonché, 110 S. E., 115..... 20

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1923.**

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## No. 322.

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JAMES C. DAVIS, AGENT APPOINTED BY THE PRESIDENT UNDER THE TRANSPORTATION ACT OF 1920, PETITIONER,

*vs.*

J. M. CURRIE.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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## BRIEF OF RESPONDENT.

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### Preliminary Statement.

This action for damages was commenced on September 19, 1919, and was tried in the Court of Common Pleas for Sumter County, S. C., on November 23, 1921. The trial resulted in a verdict and judgment in favor of respondent for $10,000.00, from which petitioner appealed to the Supreme Court of South Carolina, wherein on February 26, 1923,

judgment was rendered in effect affirming the judgment below except as to the sum of $1,340.00, which respondent remitted.

The case comes before this Court on return to a writ of certiorari duly issued.

## Statement of Fact.

On August 31, 1919, at Florence, S. C., the plaintiff purchased a ticket entitling him to transportation as a passenger on a line of railroad then in charge of the Director General of Railroads of the United States Government from Florence, S. C., to Mayesville, S. C. He then presented himself at the gate through which passengers were required or invited to pass in order to board trains. The gate was in charge of a gatekeeper, a railroad employee, to whom the plaintiff showed his ticket. The gatekeeper refused him passage through the gateway and then "shoved" him back, causing him to fall and bruise his arm, in the presence of a "crowd of people." Thereafter the plaintiff made four attempts, at separate times, to get through the gate to his train. Each time he was threatened with physical violence and cursed by the gatekeeper. He then went to the ticket agent, told him of important business plans and arrangements that made it necessary for him to get to Mayesville on the train for which he had bought his ticket. The ticket agent suggested that he try getting through another gate about seventy-five feet away, but which, as plaintiff claimed, "was not for passengers to go through." He told the ticket agent he didn't care to steal through, as he had bought his ticket. He then met Captain Johnson, a conductor for the line of railroad upon which he had taken passage, who, upon being apprised

of the situation, advised him to try the gateman again. He then went back to the gate, again showed the gateman his ticket, and was again repulsed with rude, threatening and insulting language. After that he made one or two more attempts to get through the gate, with the same result. The remarkable story, outlined by the foregoing statement, is the more remarkable in that it is corroborated rather than discredited in essential particulars by the testimony of Conductor Johnson and the ticket agent, defendant's witnesses at the trial (Trans., pp. 21, 22). Respondent's damage was assessed by the jury at $10,000.00. The judgment of the Supreme Court eliminated $1,340.00, claimed as certain business losses, leaving the recovery $8,660.00.

In making the award, the jury were permitted to consider respondent's humiliation and mental suffering as a basis for actual damages.

**Statement of Issues.**

The sole question now before the Court is stated by petitioner on page 5 of the petition as follows:

> "The sole question presented for review by this court is, Can damages for humiliation and wounded feelings be awarded the respondent against the petitioner, the United States Railroad Administration, under the provisions of the Federal Control Act, the proclamations of the President and the general orders of the director general pursuant thereto?"

However, in the brief accompanying this petition, petitioner asserts that an award for humiliation under the circumstances disclosed by the record is nothing more nor less than an award of punitive damages under a camouflage.

We, therefore, argue two propositions:

ISSUE I.

The judgment below is for compensatory damages solely.

ISSUE II.

Damages for humiliation and mental suffering are actual damages, recoverable against the Director General of Railroads.

**Points and Authorities.**

ISSUE I.

THE JUDGMENT BELOW IS FOR COMPENSATORY DAMAGES SOLELY.

*Point I.*

Concurrent findings of fact by courts below will not be disturbed unless error is palpable.

*Point II.*

This court will not consider whether verdict excessive.

Southern Railway, Carolina Division, *vs.* Bennett, 233 U. S. 80, 58 L. Ed. 860.

*Point III.*

There was no attempt to disguise the recovery or evade the rules of Federal liability.

Mo. Pacific Railway Co. *vs.* Ault, 256 U. S. 554, 65 L. Ed. 1087.

Jackson-Tweed Lumber Co. *vs.* Southern Railway Co., 113 S. C. 236, 101 S. E. 924.

Calhoun *vs.* Southern Railway Co., 115 S. C. 489, 106 S. E. 780.

Massey *vs.* Hines, 117 S. C. 1, 108 S. E. 181.

Ginn *vs.* Hines, 114 S. C. 236, 103 S. E. 548.

*Point IV.*

Proper instructions were given the jury and both courts below find these instructions were followed.

ISSUE II.

DAMAGES FOR HUMILIATION AND MENTAL SUFFERING ARE ACTUAL DAMAGES RECOVERABLE AGAINST THE DIRECTOR GENERAL OF RAILROADS.

*Point I.*

Compensatory damages are recoverable against the Director General.

Mo. Pacific Railway Co. *vs.* Ault, 256 U. S. 554, 65 L. Ed. 1087.

*Point II.*

Compensation for humiliation and mental suffering is a proper element of actual damage.

Lipman *vs.* A. C. L. R. R. Company, 108 S. C. 151, 93 S. E. 714.

Cave *vs.* Railway Company, 94 S. C. 282, 77 S. E. 1017.

Adams *vs.* Railway Company, 103 S. E. 327, 87 S. E. 1007.

Lake Shore Railroad Co. *vs.* Prentice, 147 U. S. 101, 37 L. Ed. 97.

Director General *vs.* Kastenbaum, 68 L. Ed. 84, Adv. Op. 1924, No. 3.

## ARGUMENT.

### Issue I.

### The Judgment is for Compensatory Damage Solely.

#### *Point 1.*

#### *Concurrent Findings of Fact by Courts Below Will Not Be Disturbed Unless Error Is Palpable.*

The question is: Does the record disclose that the jury intended to penalize the defendant? Since the State courts, both trial and appellate, have held that the jury did not, before the petitioner can succeed he must show something more than a mere basis for difference of opinion. He must convince this Court that the record admits of no other reasonable inference than that a penalty was inflicted. And, since on this question of fact, both courts below concurred, petitioner must go further and show that the error of which he complains is palpable.

*Point 2.*

*This Court Will Not Consider Whether Verdict Excessive.*

Petitioner admits that the jury was justified in finding that the respondent, without provocation on his part, was assaulted, bruised, and publicly cursed, in violation of the contract between carrier and passenger. The jury so found. Obviously, respondent was entitled to something by way of damages for this violation of the contract, and this outrageous infringement of his personal rights. It was the right of respondent to have a jury, and not petitioner, fix the amount. Up to this point, petitioner makes no complaint. But when the amount is fixed, he asserts that it represents a punishment to him, not compensation to respondent. Beside the fact that the amount is larger than petitioner would have voluntarily paid, petitioner puts forth no ground for his assertion. Does not his allegation, then, amount merely to the assertion that the damages are excessive? But with that question, unless the jury were given erroneous instructions as to the measure of damages, this Court will not concern itself. In Southern Railway, Carolina Division, *vs.* Bennett, 233 U. S. 80, 58 L. Ed. 860, it was said:

> "The supposed error most insisted upon is the entering of judgment upon a verdict said to be manifestly excessive. It is admitted that the judge charged the jury correctly, according to principles established by Michigan C. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. 417, 33 Sup. Ct. Rep. 192, but it is thought to be apparent as matter of law that the jury found more than the charge or the law allowed. The argument is this: The deceased was making not more

than $900.00 a year, and the only visible ground of increase was the possibility that he might be promoted from fireman to engineer, with what pay was not shown. He could not have given more than $700.00 a year to his family. His expectation of life was about thirty years by the tables of mortality. Therefore at the legal rate of interest the income from $10,000 for thirty years was all that the plaintiff was entitled to, whereas she was given the principal of $20,000.00 out and out. It may be admitted that if it were true that the excess appeared as matter of law—that if, for instance, the statute fixed a maximum and the verdict exceeded it—a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error. Lincoln *v.* Power, 151 U. S. 436, 38 L. Ed. 224, 14 Sup. Ct. Rep. 387; Herencia *v.* Guzman, 219 U. S. 44, 45, 55 L. Ed. 81, 82, 31 Sup. Ct. Rep. 135. The premises of the argument for the plaintiff in error were not conclusive upon the jury, and although the verdict may seem to us too large, no such error appears as to warrant our imputing to judge and jury a connivance in escaping the limits of the law."

*Point 3.*

*There Was no Attempt to Disguise the Recovery or Evade the Rules of Federal Liability.*

If by petitioner's assertion that the judgment is an award of punitive damages "under a camouflage" he means to imply that the State courts have attempted to disguise or hide the true nature of their holdings, so as to avoid the rule an-

nounced in Missouri Pacific R. Co. *vs.* Ault, 256 U. S. 554, 65 L. Ed. 1087, we deny the implication. It has no basis in the record or in fact. It imputes to the Supreme Court of South Carolina an intent to deceive and commit a fraud upon the Government of the United States and upon the law. Such an imputation is inconsistent with the honor of the court and the high prefessional character of the counsel whose names appear upon petitioner's brief. We, therefore, assume that no such implication was or is intended.

Indeed, both before and after the decision in Missouri Pacific R. Co. *vs.* Ault, *supra,* the Supreme Court of South Carolina held that neither penalties nor punitive damages could be recovered against the United States, whether the Director General or the carrier was the nominal party to the suit.

Jackson-Tweed Lumber Co. *vs.* Southern Ry. Co., 113 S. C. 236, 101 S. E. 924.

Calhoun *vs.* Southern Ry. Co., 115 S. C. 489, 106 S. E. 780.

Massey *vs.* Hines, 117 S. C. 1, 108 S. E. 181.

Ginn *vs.* Hines, 114 S. C. 236, 103 S. E. 548

Incidentally Jackson-Tweed Lumber Co. *vs.* Southern Ry., *supra,* is cited in the opinion in Missouri Pac. R. Co. *vs.* Ault, *supra,* and, together with Calhoun *vs.* Southern Ry. Co., *supra,* was tried in the Court of Common Pleas for Sumter County, the same court before which the instant case was tried.

The courts of South Carolina were among the first in the United States to correctly interpret the liability of the Government under the Federal Control Act and to limit that

liability to awarding actual compensation to those damaged by delict of the Director General or his agents in performing the functions of a carrier. We see nothing in the instant case to indicate a departure from the views thus early announced and steadfastly maintained.

*Point 4.*

*Proper Instructions Were Given the Jury and Both Courts Below Find These Instructions Were Followed.*

Turning to the record in the case at bar, we are struck with the care with which the jury were cautioned not to include punitive damages in their verdict.

It is stated at the outset that the action is against the United States, and that by it plaintiff seeks to recover actual damages, and differentiated from punitive damages (Trans., p. 9). Later on the Court correctly defines the terms negligence and willfulness, punitive damages and actual damages. Then:

> "Punitive damage is not an element in this case. It is my duty to charge you that you cannot award punitive damages here to the plaintiff, for the reason that punitive damages are not competent here as against the Government. So you confine yourselves to the evidence in this case with the view of determining whether or not the plaintiff is entitled to recover what I have explained to you as actual damages" (Trans., p. 10).

In commenting upon a request to charge that—

> "The fact that an injury was occasioned by willful and not negligent acts of the servants of a carrier

does not excuse the carrier for a failure to carry out its duty to a passenger,"

the Court goes on to repeat:

> "That is correct, and right there I tell you as I already have told you that the plaintiff is seeking to recover only actual damages, and *that is the only damages you can award him,* if you award him damages. Actual damages may flow out of a negligent act or a willful act. The plaintiff seeks to recover in this action only actual damages. So, gentlemen, *disabuse your minds of any doubt that may be raised there that it is within your province to award punitive damages, because you could not award anything but actual, tangible, measurable damages* growing out of this case * * *" (Trans., p. 13).

And, again, the Court charged petitioner's first request, with the comment shown below:

> "I charge you that this being an action against the Director General or Agent of the United States Government then operating the Atlantic Coast Line Railroad Company, you cannot find any punitive damages against the United States Government.
>
> "That is correct. I have already told you so. Any verdict you may render, involving punitive damages would be incompetent, because it is not consistent with this Court. As I said, and I reiterate, that the measure of damages that you can award in this case, if you award any to the plaintiff, is actual damages" (Trans., p. 14).

In the light of findings to the contrary by both the trial judge and the appellate court it cannot be assumed that the jury disregarded these forcible and explicit instructions.

The trial judge said in his order refusing a new trial:

> "I am persuaded the jury gave heed to the instructions of the Court, and returned a verdict which they decided was in response to the positive directions of the Court in so far as any consideration of the law is concerned affecting punitive damages" (Trans., p. 16).

The Supreme Court, concurring in this view, adds:

> "While the amount of the verdict is unquestionably large, we are not prepared to hold that the award is so excessive as clearly to indicate a punitive purpose, or primarily to entail a penal consequence. * * * There is no market value for injured feelings. The value of money in comparison with the value of a normally self-satisfied state of mind of which a man may be deprived by a wrongful invasion of his rights, a trampling upon the sensitive tentacles of his personal dignity, a public aspersion upon his manhood, or by abusive treatment of any character, is a matter as to which reasonable men may—and do—differ widely. The verdict was approved by the Circuit Judge as an award of compensatory damages. His conclusion cannot be held erroneous as a matter of law" (Trans., p. 27).

On page 6 of his brief, petitioner quotes certain language from the order of the trial court refusing a new trial, appearing on page 18 of the transcript, to the effect that there would be less litigation in the Court if private rights were respected, and that the public would find solution for a number of its ills if it better understood private rights, and insisted that no one invade them with impunity or in contravention of law. Petitioner draws conclusion that "this language shows clearly

the trial judge was imbued with the idea that a verdict rendered as punishment for a wilful act could be found against the Government."

Passing, without further comment, the logical lack of sequence in this argument, it seems only necessary to refer to the quoted excerpts from the judge's charge to show that he had no such idea.

We submit that the language of the trial judge made the subject of this comment was merely preliminary to the thought expressed in the succeeding paragraph of his order that "enforced humiliation strikes at the supreme element of manliness." What the judge meant was this: It is a serious thing to humiliate a man and imperil his manliness by forcing him to submit to an invasion of his personal rights. To right such a wrong by an award of damages not only does equity between man and man, but is a salutary example of justice to which the attention of those who charge the law with failure is directed.

To summarize, we submit that there is no evidence from which this Court can conclude that the courts below were in error in holding that "the verdict indicates a punitive purpose or entails a penal consequence;" that the real nature of petitioner's complaint is that the verdict is excessive, which will not be considered by this Court; that there is no attempt to penalize the Government by disguising the nature of the action or of the recovery, nor to evade the measure of Federal liability announced by the Court of South Carolina in Jackson-Tweed Lumber Company *vs.* Southern Ry., *supra,* and later by the Court in the case of Ault; that the jury below was correctly charged as to the measure of damages and nature of the petitioner's liability, and, finally, that there is

nothing in the record to justify a reversal of the concurrent finding of two courts below that the jury followed these instructions.

## Issue II.

### Damages for Humiliation and Mental Suffering are Actual Damages, Recoverable Against the Director General of Railroads.

#### *Point 1.*

#### *Compensatory Damages are Recoverable Against the Director General.*

In Missouri Pacific R. Co. *vs.* Ault, 256 U. S. 554, 65 L. Ed. 1087, this Court said, in commenting on Section 10 of the Federal Control Act, that carriers shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law.

> "By these provisions the United States submitted itself to the various laws, State and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws the validity and extent of claims against the United States arising out of these laws were to be determined. * * * The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law. * * * Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control."

*Point 2.*

*Compensation for Humiliation and Mental Suffering is a Proper Element of Actual Damages.*

Petitioner practically concedes the correctness of this proposition when he states in his brief accompanying the petition herein:

> "It cannot be denied that generally speaking awards for humiliation have been considered compensatory rather than punitive" (pp. 12-13).

That a jury, in awarding compensatory damages, may consider injury to feelings, mental distress, humiliation and the like, resulting from a carrier's breach of the contract of carriage, is too well settled to justify the citation of general authorities. Such is the law of South Carolina, as settled by Lipman *vs.* A. C. L. R. R. Co., 108 S. C. 151, 93 S. E. 714; Cave *vs.* Ry. Co., 94 S. C. 282, 77 S. E. 1017; Adams *vs.* Ry. Co., 103 S. C. 327, 87 S. E. 1007.

In Lake Shore R. Co. *vs.* Prentice, 147 U. S. 101; 37 L. Ed. 97, the plaintiff was falsely arrested and abused by the conductor. The question raised in this Court was whether punitive damages were recoverable against the company. In passing upon the correctness of the charge of the trial judge, the Court said:

> "In the case at bar, the defendant's counsel having admitted in open court 'that the arrest of the plaintiff was wrongful, and that he was entitled to recover actual damages therefor,' the jury were rightly instructed that he was entitled to a verdict which would fully compensate him for the injuries sustained, and

that in compensating him the jury were authorized to go beyond his outlay in and about this suit, and to consider the humiliation and outrage to which he had been subjected by arresting him publicly without warrant and without cause, and by the conduct of the conductor, such as his remark to the plaintiff's wife."

Justice Marion, in writing the opinion of the State Supreme Court, summed up the matter as follows:

"There can be no doubt that under the settled law of this jurisdiction, prior to the passage of the Federal Control Act, such breach of the carrier's duty to a passenger as proximately caused the infliction of injury to feelings, mental suffering or humiliation even in the absence of physical injury, afforded an adequate legal foundation for the award of actual or compensatory damages. Lipman *v.* A. C. L. R. Co., 108 S. C. 151; Cave *v.* Ry. Co., 94 S. C. 282; Adams *v.* Ry., 103 S. C. 327. That view, as pointed out by Mr. Justice Hydrick in Lipman *v.* R. Co., *supra,* is in accord with the overwhelming weight of reason and authority. In the case of Gillespie *v.* B. H. R. Co., 178 N. Y. 347, 102 A. S. R. 503, the New York Court considers the question, and very fully reviews the authorities, as to whether damages for humiliation suffered because of such breach of the carrier's duty are properly recoverable as compensatory damages, and arrives at a conclusion in accord with the following statement of the law quoted from Thompson on Negligence, Sec. 3288:"

"Damages given on the footing of humiliation, mortification, mental suffering, etc., are compensatory, and not exemplary damages. They are given because of the suffering to which the passenger has been wrongfully subjected by the carrier. The

quantum of this suffering may not and generally does not depend at all upon the mental condition of the carrier's servant, whether he acted honestly or dishonestly, with or without malice."

"See Joyce on Damages, Sec. 354; 4 R. C. L. 1174, 1175. In the case at bar there was evidence tending to establish a breach of the contract of carriers by tortuous conduct subjecting a passenger to the indignity of assault and battery, insult and contumely. For the injury to his feelings, humiliation and mental suffering thus inflicted upon the plaintiff by the servants of a carrier under the control of the Director General of Railroads, we are clearly of the opinion that compensatory damages were recoverable."

In Director General *vs.* Kastenbaum, 68 L. Ed. 84 (Adv. Op. 1924, No. 3), this Court has recently held the Director General liable to a plaintiff for damages flowing from a false arrest. The case was No. 39 of the October term, 1923, and the transcript of record, page 83, shows that the jury was charged, in case the plaintiff was entitled to recover, that they might consider the money damage testified to, and also the suffering he endured by reason of being locked up overnight and by reason of humiliation at being arrested and charged with a serious offense. In this Court no special exception was taken to this language, but it was charged generally that the Government was not liable under the Federal Control Act. The position was overruled by the Court, on authority of Missouri Pac. R. Co. *vs.* Ault, *supra,* the Court saying:

"The government under paragraph 10, in a case of false imprisonment, stands exactly as if it were a railway corporation operating as a common carrier.

> Such a corporation would clearly be responsible for an arrest of the kind here shown, if without probable cause and made by one of its detectives employed to protect the property intrusted to its care as a common carrier. It is within the scope of the agency of such an employee to discover the perpetrators of crime against the property in order to recover it, and to procure the arrest of supposed offenders and their prosecution and conviction in order to deter others from further depredations. If, in the field of such employment, the agent acts without probable cause and an illegal arrest without judicial warrant is made, the corporation is liable as for any other act of its agents within the scope of their employment in carrying on the business of a common carrier. Philadelphia, W. & B. R. Co. *v.* Quigley, 21 How. 202, 210, 16 L. Ed. 73, 75; Genga *v.* New York, N. H. & H. R. Co., November 29, 1922, 243 Mass., 101, 137 N. E. 637."

Since humiliation is always present in false arrest cases and damages for the mental suffering caused by it forms nearly always a very material element of the recovery, we feel that the Kastenbaum case is conclusive of the matter.

**By Way of Reply.**

There are several matters suggested by petitioner's brief to which our attention has been directed.

On page 5, petitioner complains because the question of the Government's alleged wilful conduct was submitted to the jury. No similar objection was made at the trial. Moreover, if the Government be liable when its agent inadvertently fails to perform his duty, it must likewise be liable when the failure is the result of conscious neglect. The duty unper-

formed is the cause of liability, and the measure of damages is the same whether the non-performance of duty was intentional or unintentional. From the standpoint of the injured plaintiff, his actual damages are the same in either event.

In the case at bar, when Currie became a passenger, it was the duty of petitioner to afford him transportation and protect him from assault and indignity. Petitioner failed to perform this duty, denied Currie transportation and assaulted, pushed him down and bruised him, and offered him indignity under circumstances calculated to inflict, and which did inflict, intense mental suffering upon him. It makes no difference what the mental attitude of petitioner's agent may have been. He may have mistakenly read Currie's ticket; he may have honestly thought it a theatre ticket and Currie a fraudulent trespasser; he may not have seen the ticket at all; he may have been drunk, or he may have fully apprehended Currie's rights and consciously invaded them—in any event, petitioner's duty was not performed and Currie was damaged in precisely the same degree.

The foregoing remarks are equally applicable to petitioner's discussion of the Kastenbaum case on pages 24 and 25 of his brief. This Court, in that case, held that Kastenbaum was entitled to damages because the Government had failed to perform its duty toward him by arresting him without probable cause, even if it might be assumed that the Government acted in good faith. Applying such an assumption to the case at bar does not destroy Currie's cause of action or impair his recovery. The Government, in good faith, if needs be, but without good cause, has failed to perform its duty toward

Currie, its passenger, in which failure indignity, abuse and assault have been heaped upon him.

In his argument, petitioner attempts to shift his ground so as to rely upon Matthews *vs.* Davis, Director General, 117 S. E. 642 (pp. 19-21 of brief), and advances the proposition that the judgment below is wrong because it imposes a liability upon the Government for the wilful and malicious acts of its agent done in the course of his employment, but without any apparent relation thereto.

This proposition cannot be considered by this Court, for the reason that it was not raised below in any way.

The exceptions to the State Supreme Court are found in the record at pages 18, 19 and 20. Nowhere is the contention made that the Government was not liable for actual damages; the argument was that humiliation was not a proper element of such damages. There was no demurrer to the complaint, no motion for non-suit or direction of verdict. Failing to so save the point, petitioner cannot now be heard to demur to the evidence or to assert that the evidence fails to show any liability. Rule 77, Circuit Court of S. C.; Smith *vs.* Whitmire (S. C.), 110 S. E. 80; Tolbert *vs.* Fouché (S. C.), 110 S. E. 115; Scott *vs.* Seymour, 105 S. C. 43.

In Smith *vs.* Whitmire, it is said:

> "Where the undisputed facts entitle a party to a verdict, the question must be made on circuit by a motion for a non-suit or a directed verdict."

The present contentions of appellant is that the record leaves no doubt that the gateman in assaulting, cursing and abusing the plaintiff acted wilfully and without any apparent purpose of discharging his duties to the Government,

and that under such circumstances the Government cannot be held responsible. This simply amounts to saying that the Government was entitled to a verdict under the undisputed testimony, and, since the point was not raised by motion for a non-suit or directed verdict, it cannot be considered.

Not waiving the position, we call attention to the great difference between Mathews *vs.* Director General, 117 S. E. 642, and the case at bar. In the Mathews case, plaintiff was not a passenger; there was no contractual relationship between plaintiff and the Government, and the wrong complained of was not the failure of the Government to perform its contract. From the report of the case, Bell, the telegraph operator, embarked upon the commission of a private tort, in no way connected with his employment. In the case at bar, Crosswell, the gateman, was charged not only with the duty of admitting persons who were entitled to pass through the gate, *but also with the duty of stopping those not so entitled.* His transaction with Currie was not without apparent relation to his employment, but was in the actual performance of his duty.

For all of these reasons, we consider the decision in the Mathews case inapplicable, and that case is in no way under review. If it were, we should call special attention to the very able dissenting opinion.

Petitioner quotes from Hines *vs.* Gravins (Va.), 118 S. E. 114, and discusses the case at some length (Brief, 10-13). No adequate conception of this decision can be had apart from the earlier decision in the same case reported in 112 S. E. 869. The case is entirely distinguishable from the case at bar. It was an attempt to impose liability upon the Government under a statute which provided that:

> "All words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of peace, shall be actionable. No demurrer shall preclude a jury from passing thereon."

The court says:

> "The design of the statute is to prevent breaches of the peace, to discourage offensive and excessive freedom in the use of that unruly member, the tongue, to inflict punishment therefor, and by subjecting those who are so hasty of temper and inconsiderate of the feelings of others as to insult them to such actual and punitive damages as may be awarded by a jury" (112 S. E. 871).

The statute so construed necessarily indicates a punitive purpose and entails a penal consequence.

It further appears that no actual damages were proved, and there was no publication of the insulting words, which were spoken to plaintiff without the hearing of any other person.

The essentially punitive nature of the statute and the absence of any actual damage leave the Virginia case without weight in the present inquiry. Under these circumstances, the Court held an action based on the statute alone not a claim for "injury to person," as used in Section 10 of General Order 20. The Court might also have held that the statute in question was beyond the purview of the Federal Control Act, wherein it was provided that "carriers while under Federal control should be subject to all laws and liabilities *as common carriers* * * * arising under state * * * laws."

It must also be remembered that in the case at bar Currie

did receive a substantial physical injury. He was shoved down and caused to fall against the iron grill or railing separating the tracks from the station, sustaining bruises. In the Virginia case, Gravins sustained no injury or damage of any kind whatsoever; there was nothing for which he could be compensated, and it was so held by the Court. Consequently, any damage awarded him must have been punitive in its character.

The case of Davis *vs.* Green, 260 U. S. 349, 67 L. Ed. 299, cited by petitioner on page 23 of the brief, is totally beyond the point. There was no question here as to the liability of the Government as distinguished from liability of a railroad company under similar circumstances. This Court held that since the injury complained of was a wilful act wholly outside of the scope of the employee's duty, there was no room for the doctrine of *respondeat superior.*

Much more to the point is Seymour *vs.* Director General (D. C. App.), 290 Fed. 291. Seymour, a newsboy on a train, held to have the status of a passenger, was assaulted and beaten by Regan, a railroad detective, who accused him of flirting. The Court held that the acts done were in the scope of Regan's authority, and on the point of the liability of the Government, as distinguished from the general liability of a master, said:

> "It is suggested by counsel for the defendant that inasmuch as the purpose for which the Government permitted itself to be sued was compensation and not punishment, this action would not lie. In making this contention, however, counsel evidently overlooked the nature of this action, which is one for the recovery of that for which the Government permitted itself to be

sued, that is compensation for injuries inflicted. See Mo. Pac. R. R. Co. *v.* Ault, 256 U. S. 554, 41 Sup. Ct. 593, 65 L. Ed. 1087."

In a special concurring opinion, Chief Justice Smythe says:

"Doubting that the act complained of came within the scope of Regan's specific authority, I prefer to place my concurrence in the judgment of reversal upon the broad ground that Seymour was a passenger and as such entitled to protection from the railroad company against assault by its employees (citing cases, among them New Jersey Steam-Boat Company *v.* Brackett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1029).

We invite the attention of the Court to the Brackett case, in which it is held that a carrier is bound, as far as practicable, to protect its passengers from violence committed by strangers, and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.

Respectfully submitted,

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SUMTER, S. C., *April* 7, 1924.